STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Opinion and Order
entered by the Sixth Judicial Circuit
(Oakland Co.) dated September 9, 2002

IN THE MATTER OF

KIARA HERRON, KEANGELO
LAGRONE, KEMARIA LAGRONE,
AND KEJUAN JEFFERSON

Supreme Court
No. 122666
COA No. 244028
Oakland Co. Circuit Ct.
No. 98-613188 NA
(Judge Joan E. Young)

_____/

FAMILY INDEPENDENCE AGENCY,
Petitioner,

v

TINA JEFFERSON, RICHARD JEFFERSON,
FREDERICK HERRON, LARRY LAGRONE
Respondents.

_____/

BRIEF ON APPEAL OF APPELLEE PUTATIVE FATHER LAGRONE

ORAL ARGUMENT REQUESTED

BY: J. DOUGLAS OTLEWSKI (P28959)
Attorney for Larry Lagrone
118 Walnut
Rochester, MI 48307
(248) 651-6040

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

INDEX OF AUTHORITIES

Page

Cases

Statutes

Court Rules

STATEMENT OF THE BASIS OF JURISDICTION

In an Order dated September 25, 2003, this Honorable Court *granted* the Appellant's Application for Leave to Appeal pursuant to MCR 7.302.

APPELLEE LARRY LAGRONE'S COUNTERSTATEMENT OF FACTS/PROCEEDING

On April 30, 2002, Oakland County Family Court Judge Joan E. Young entered an Order authorizing a Petition dated April 25, 2002, as amended, requesting termination of parental rights of putative father, Larry Lagrone, regarding Kiara Herron, Kejuan Jefferson, Keangelo Lagrone and Kemaria Lagrone. [See Appellant's Appendix, Pages 10a to 14a] The allegations included, inter alia, the following:

> *"Z. Larry Lagrone is the putative father of Kemaria Lagrone, Keangelo Lagrone and Kejuan Jefferson. Although he lives at 148 Sanderson, Pontiac, MI, he has not offered a plan for their care and custody. Neither Larry Lagrone, nor any John Doe has asserted or acknowledged paternity of these children. . .*
>
> *"Wherefore, Co-Petitioners respectfully request this Honorable Court authorize this petition and take permanent custody of these children and . . .terminate putative father Larry Lagrone's parental rights pursuant to MCL 712A.19b(3)(a)(ii) and/or (g) and/or father John Doe pursuant to MCL 712A.19b(3)(a)(I) and/or (g) (as to the children Kemaria, Keangelo, and Kejuan . . ."*

Appellee Lagrone was served personally with a copy of said Petition and a Summons: Order to Appear. [See Appellee's Appendix, Pages 3b and 4b] The Summons included the following language:

> *"3. **YOU ARE ORDERED** to appear in person before the court for a hearing on the allegations in the attached Petition . . . **WARNING:** you are*

> *notified that this hearing may result in a temporary or permanent loss of your rights to the child(ren).. . .**FAILURE TO APPEAR** may subject you to the penalty for contempt of court, and a bench warrant may be issued for your apprehension."*

That Summons was dated May 3, 2002, and signed by Oakland County Family Court Judge Joan E. Young. At a preliminary hearing conducted on April 25, 2002, Appellee Lagrone was granted parenting time with Keangelo, Kejuan, and Kemaria to be supervised by the Family Independence Agency (FIA). That Order was entered by Oakland County Family Court Judge Joan E. Young on April 30, 2002. [See Appellee's Appendix, Page 5b]

Pretrial hearings were held before Oakland County Family Court Referee Twila C. Leigh on May 8 and July 8, 2002. At the latter hearing, the Court took testimony from mother, Tina Jefferson, and her husband, Richard Jefferson. That testimony identified Larry Lagrone as the biological father of Kejuan Jefferson, Keangelo Lagrone, and Kemaria Lagrone, and was uncontradicted. The Court also received DNA test results from FIA worker Mr. Touchstone which confirmed Mr. Lagrone's status as the biological father. [See Appellant's Appendix, Page 23a]

On July 9, 2002, Appellee Larry Lagrone filed a Motion for Determination of Legal Father. [See Appellant's Appendix, Page 14a] Oral arguments were heard before Judge Joan E. Young on July 26, 2002, and the Court issued a written

Opinion and Order dated September 9, 2002, granting Appellee Lagrone's Motion for Determination of Legal Father. [See Appellant's Appendix, Pages 4a to 8a]

On September 25, 2002, Appellant filed an Application for Leave to Appeal and further proceedings in the trial court were stayed. The Michigan Supreme Court granted Leave to Appeal on September 25, 2003. Appellant filed a supplemental response to the Supreme Court's Order and Opinion in the companion case, In re CAW, 469 Mich 192; 665 NW2d 475 (2003), seeking clarification. The Supreme Court thereupon issued the following Order, directing the parties to address these issues:

> *By order of December 26, 2002, the application for leave to appeal was held in abeyance pending the decision in In re CAW (Docket No. 122790). On order of the Court, the opinion having been issued on July 23, 2003, 469 Mich 192 (2003), the application for leave to appeal from the November 1, 2002, decision of the Court of Appeals is again considered and it is GRANTED, limited to the following issues: 1) Does a putative father have standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father? 2) In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children? 3) Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act? 4) Given that MCR 3.921(C)(2)(b) [formerly, MCR 5.921 (D)(2)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act? 5) Does in re CAW apply to this case?*

ISSUE 1

DOES A PUTATIVE FATHER HAVE STANDING IN A JUVENILE CODE CHILD PROTECTIVE PROCEEDING TO REQUEST A PATERNITY DETERMINATION WHERE THE SUBJECT CHILDREN ALREADY HAVE A LEGAL FATHER?

Appellee Putative Father Lagrone Answers "Yes"

Standard of Review: Questions of law are reviewed *de novo*. People v Stevens, 460 Mich 626; 597 NW2d 53 (1999). This will be the same standard of review for all questions posed by this Court.

Standing of a putative father to make such a request in a child protective proceeding is controlled by several Court Rules. MCR 3.921 provides in part that a putative father is entitled to participate, *". . . if, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(4) . . ."*

As relevant here, MCR 3.903 states:

> *(A) . . . When used in this subchapter, unless the context otherwise indicates:*
>
> *(1) "Child born out of wedlock" means a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of the marriage.*
>
> *(4) "Father" means:*
>
> *(a) A man married to the mother at any time from the minor's conception to*

the minor's birth unless the minor is determined to be a child born out of wedlock."

Appellee Lagrone agrees with the Appellant that the Juvenile Code contains no specific statutory provision addressing the court's authority to determine paternity based upon a request by a putative father. However, MCL 712A.2(b)(1) requires that the juvenile court, as a prerequisite to assuming jurisdiction over a child under 18 found within the county, must identify a *". . .parent or other person legally responsible for the care and maintenance of the child (who), when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical or other care necessary for his or her health or morals . . ."* As noted by Appellant in his brief, the Court of Appeals has held on at least two occasions that a trial court has the authority to make a determination of paternity in a child protective proceeding. In re Montgomery, 185 Mich App 341; 460 NW2d 610 (1990), and In re CAW, 253 Mich App 629; 665 NW2d 475 (2003). The latter case, quoting In re Montgomery, answered the question this way: *"During child protective proceedings, the court can determine the child to be born out of wedlock and then take appropriate steps to determine the identity and rights of the biological father."* In re CAW (supra at 637-638) The majority in In re CAW, 469 Mich 192; 665 NW2d 475 (2003), seemed to agree, but reversed the Court of Appeals decision because, *". . .the requirements of the court rule to give Heier a putative father standing were not met ...due to the fact that ... no finding was ever made by the court that CAW was not the issue of the marriage. . ."* It is noted that the current

version of the rules applied therein are virtually identical to the rules cited in In re Montgomery, save for renumbering.

Whether or not a putative father has standing to initiate a specific request for a determination of paternity under the Juvenile Code (as this Court has phrased the issue), it is clear that Appellee Lagrone was a named Respondent in the Petition. [See Appellant's Appendix, Pages 10a and 14a] It is also clear that MCL 712A.2(b)(1) and MCR 3.921, read in conjunction with MCR 3.903, mandate an inquiry by the trial court as to who is legally responsible for the care of children. Only by making such an inquiry may the court determine who is properly charged and a proper party to a termination proceeding under the Juvenile Code. As Justice Kelly opined in her Concurring/ Dissenting Opinion in In re CAW (supra, Mich), *". . .The purpose of termination proceedings under the Juvenile Code is to assure a child of care, guidance, and control conducive to his welfare and the interest of the State."* Those purposes cannot be fairly accomplished by a procedure that fails to identify and notify interested parties of the proceedings.

Unlike In re CAW (supra, Mich), where putative father Heier sought intervention following conclusion of a termination hearing to which he was not provided notice, intervention is not required herein to permit Appellee Lagrone's participation. Indeed, Appellee Lagrone was named and charged with neglect as a Respondent in each of the Petitions filed by the Family Independence Agency and the Oakland County Prosecutor's Office. Allegation "Z" of the Petition alleged that

Mr. Lagrone had not offered a plan for the care and custody of his children, and requested termination of his parental rights. [See Appellant's Appendix, Page 14a] His appearance was compelled by Summons which warned that failure to appear may subject him to apprehension. [See Appellee's Appendix, Pages 3b and 4b]

Appellee Lagrone's standing as a Respondent with parental rights in the proceedings was underscored by the trial court's Order following the preliminary hearing on April 30, 2002 specifically granting him parenting time. [See Appellee's Appendix, Page 5b] By contrast, putative father Heier in In re CAW (supra, Mich) never appeared during the trial and no inquiry as to the paternity of the children was ever made by the trial court.

The decision by a trial court to provide notice to a putative father is not insignificant. As Justice Kelly noted in her Concurring/Dissenting Opinion in In re CAW (supra, Mich), *". . .In general, notice is not required for persons who merely have an interest that might be affected by the outcome of the case . . ."* Since MCR 3.921 designates persons who must be given notice before child protective proceedings can go forward, it is clear that Appellee Lagrone's appearance and participation in these proceedings are not in the nature of intervention, but a response to notice of substantive allegations of neglect seeking termination of his parental rights. Indeed, the service of a Summons ordering his appearance in person before the Court, along with a warning that such hearings may result in the

temporary or permanent loss of the rights to his children, further distinguishes his participation from that of Mr. Heier in In re CAW (supra, Mich).

In summary, In re Montgomery, In re CAW (supra, Mich App), In re CAW (supra, Mich), and the applicable Court Rules outline a procedure which requires that the juvenile court make a legal determination as to paternity if the issue is timely raised. In the instant case, the request for such a determination was brought before the Court by both the putative father as well as the allegations in the Petition itself. Appellee Lagrone's Motion for Determination of Legal Father is a response to those allegations, and clearly satisfies the language of MCR 3.921 requiring that the inquiry be made, *"...at any time during the pendency of a proceeding..."*

Where, as here, there is no dispute between the parties as to the identity of the biological father, no argument can be made that advancement of the sanctity of the family unit would be achieved by denying standing to Appellee Lagrone. Indeed, as Justice Kelly noted in her Concurring/Dissenting Opinion in In re CAW (supra, Mich), *". . .That proposition is absurd in the context of termination proceedings, the object of which is to destroy any familial bond between a child and the parent whose rights are being terminated. . ."*

ISSUE 2

IN THIS CASE, IS THERE LEGAL SIGNIFICANCE TO THE TRIAL COURT'S FINDING THAT THE PUTATIVE FATHER IS THE BIOLOGICAL FATHER OF THREE OF THE CHILDREN?

Appellee Putative Father Lagrone Answers "Yes"

A putative father under MCR 3.903(A)(23) is:

> *". . .a man who is alleged to be the biological father of a child that has no father as defined in MCR 3.903(A)(7). A "father" is defined under MCR 3.903(A)(7) in pertinent part as:*
>
> *(a) A man married to the mother at any time from the minor's conception to the minor's birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;*
> *(b) A man who legally adopts the minor;*
> *(c) A man who by Order of Affiliation or by Judgment of Paternity is judicially determined to be the father of the minor;*
> *(d) A man judicially determined to have parental rights; or*
> *(e) A man whose paternity is established by the completion and filing of an Acknowledgment of Parentage in accordance with the provisions of the Acknowledgment of Parentage Act . . . For an acknowledgment under the Acknowledgment of Parentage Act, the man and mother must each sign the acknowledgment . . ."*

The trial court's finding that the children were not the issue of the marriage is based upon testimony from Richard Jefferson, Mother Tina Jefferson, Mr. Lagrone, and FIA representative Touchstone as to DNA testing. The Court's finding

that Appellee Lagrone is the biological father of three of the children is a necessary precursor to its finding that he is also the legal father. A "father" as defined under MCR 3.903(A)(7)(d), is, to wit: *"A man judicially determined to have parental rights."* The trial court's finding that Appellee was a "father" was made after its determination that the children were born out of wedlock.

The legal significance of the Court's finding that Appellee Lagrone is the biological father is that it satisfies the Court Rule's requirement that a judicial determination be made that Appellee Lagrone has parental rights and that he meets the definition of "father" under MCR 3.903(A)(7)(d). Such a determination would appear to obviate the necessity of further litigation or filings (such as paternity, filiation, or acknowledgment) under the same rule.

Appellee Lagrone would note that nothing in the Court Rules requires a prior or extra-judicial determination of parental rights, nor is there any other impediment to the trial court in making such a determination. In re Montgomery. Indeed, public policy would seem to support an expedient determination by the court of these issues, where planning and placement of children hang in the balance.

ISSUE 3

DO THE JUVENILE COURT RULES PROVIDE GREATER STANDING TO A PUTATIVE FATHER THAN IS PROVIDED BY THE PATERNITY ACT?

Appellee Putative Father Lagrone Answers "Yes"

In Girard v Wagenmaker, 437 Mich 231, 470 NW2d 372 (1991), the Supreme Court interpreted Michigan's Paternity Act, MCL 722.711, concerning its definition of "child born out of wedlock." That Act defines a child born out of wedlock as a child that, *". . .the court has determined to be a child born or conceived during a marriage but not an issue of that marriage."* MCR 3.903(A)(1) defines a "child born out of wedlock" as, *". . .a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage."* An analysis of the difference in the language of the Paternity Act and that used by the Juvenile Court Rules serves to highlight the disparate purposes that each proceeding serves. Both the Juvenile Code and the accompanying Court Rules require, in a child protective proceeding, the proper identification of a parent responsible for the care and custody of a child coming within the jurisdiction of the court. The responsibility of a court in a termination or neglect proceeding to identify the parents who have failed to provide proper care is fundamentally different than the underlying public policy considerations for the

enactment of the Paternity Act. That difference was recognized and enunciated by Justice Kelly in her Concurring/Dissenting Opinion in In re CAW (supra, Mich):

> *". . .the public policy objective of the Paternity Act is to ensure all children are provided with support and education . . .the objective would be frustrated if a legal father were able to abandon his duty of support as a result of unfounded allegations of paternity. Hence, before an action can be sustained under the Paternity Act, a determination must be made that the child in question was born out of wedlock.. . . .By contrast, the purpose of termination proceedings under the Juvenile Code is to assure a child of care, guidance, and control conducive to his welfare and the interest of the State . . .Accordingly, when a child is removed from his parents, the court must provide him with care that approximates the care his parents should have provided . . .Thus, the two Acts serve different masters. A person must not blindly assume that a single public policy consideration fulfills their distinct purposes. In accordance with that rationale, I do not agree that the presumption of legitimacy rule has persuasive force in this case. Certainly, the majority would not advance the argument that this rule protects the sanctity of CAW's family unit. That proposition is absurd in the context of termination proceedings, the object of which is to destroy any familial bond between a child and the parent whose rights are being terminated. The language of Girard identifies that in a paternity action, a putative father would not have standing to establish paternity of a child born while the mother was legally married to another man without a prior determination that the mother's husband is not the father."* 437 Mich at 235. (Emphasis added)

By contrast, a putative father is entitled to participate in a child protective proceeding if, at any time during the pendency of the proceeding, the court

determines that the minor has no father as defined under the Court Rules. MCR 3.903 *et seq*. In In re Montgomery, the first case to precisely consider this question, the Court of Appeals recognized a duty under the rules to identify a child born out of wedlock and make a determination of the legal father. That Court did not specifically compare the participation of a putative father to that of a putative father under the Paternity Act, presumably because the case was brought under the Juvenile Code. Any comparison of the two procedures must therefore take into account that the statutes serve different purposes, are initiated in different ways, and accomplish different results.

Appellee Lagrone's status as a charged Respondent herein conferred standing to defend the allegations in the Petition. To that extent, the trial court has invited him in; he has not intervened. The Juvenile Court Rules requiring an inquiry and determination of a "father" are thus a function of the Court assuming proper jurisdiction over children under the Juvenile Code, irrespective of the standing requirements of the Paternity Act.

ISSUE 4

GIVEN THAT MCR 3.921(C)(2)(B) [FORMERLY MCR 5.921(D)(2)(B)] AUTHORIZES A FAMILY DIVISION JUDGE TO DETERMINE THAT A PUTATIVE FATHER IS THE CHILD'S "NATURAL" FATHER, DOES THE RULE AUTHORIZE THAT JUDGE TO DETERMINE THAT THE PUTATIVE FATHER IS THE LEGAL FATHER OR MUST THE PUTATIVE FATHER FILE A COMPLAINT PURSUANT TO THE PATERNITY ACT?

Appellee Putative Father Lagrone Answers "Yes"

There are two bases under which a family division judge may determine that a putative father is a legal father. MCR 3.921(C), which addresses the issue of notice to putative fathers, states in pertinent part:

> *"(C) If at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in this subrule."*

MCR 3.903(A)(7) defines "father" as: *"(d) A man judicially determined to have parental rights."*

In order for the court to determine that a putative father is the child's "natural" father, as set forth in MCR 3.921(C)(2)(b), a family division judge must first determine that the minor has no "father," as defined in MCR 3.903(A)(7). That being done, the rule contemplates that the court may use its discretion to "take appropriate action." Under In re Montgomery, appropriate action would include

making a judicial determination as to the legal father. Paternity Act cases such as Girard (supra), which require a prior determination of paternity as a precursor to standing, apply a different statute for a different purpose. [See Justice Kelly's Concurring/Dissenting Opinion in In re CAW (supra, Mich)]

The purpose of the Juvenile Code in identifying legally responsible parents prior to removal of their children is clear: without such a determination, terminations cannot effectively proceed. That purpose is not at odds with a judicial determination of paternity within the context of the same proceeding; indeed, the rules appear to contemplate it. MCR 3.903(A)(7), (C). A putative parent commanded by the court to defend allegations of neglect may elect to raise issues related to his parentage under the rules, lest he be foreclosed from ever raising them again. Where the court, as in the instant case, makes such a determination, judicial economy and the best interests of the children dictate its enforceability, particularly where the commencement of additional litigation would achieve nothing more than delay.

ISSUE 5

DOES *IN RE CAW* APPLY TO THIS CASE?

Appellee Putative Father Lagrone Answers "Yes"

Although the instant case is clearly distinguishable on the facts, the answer is "Yes." In re CAW (supra, Mich) involved a putative father who sought to intervene following a trial court termination of the legal parents' rights. The putative father alleged lack of notice pursuant to MCR 5.921(D) (now MCR3.921) which precluded his participation in that proceeding.

The majority denied putative father's standing, holding:

> *"The essence of this rule is that a child has a father if his mother is married at any time during gestation unless the court determines by judicial notice or otherwise that the child was not the issue of the marriage. In this case, CAW had a married mother and father, Deborah Ann Weber and Robert Rivard, during the gestation period. Moreover, no finding was ever made by the court that CAW was not the issue of the marriage. (Emphasis added) The termination of Rivard's parental rights was not a determination that CAW was not the issue of the marriage and, thus, that Rivard was no longer his father; rather, it was only a determination that Rivard's legal rights were terminated. Thus, the requirements of the court rule to give Heier a putative father standing were not met. (Emphasis added)*

In the instant case, putative father Lagrone was named as a Respondent in a Petition and Summons requesting termination of his parental rights for failure to offer a plan for their care and custody. Appellee Lagrone appeared at every scheduled hearing, was granted immediate supervised visitation with the children, was appointed counsel at every stage of the proceeding, and was in every way treated by the Court as an interested party. Unlike putative father Heier, Mr. Lagrone's appearance and participation in the proceedings cannot fairly be characterized as intervention. His Motion for Determination of Legal Father [see Appellant's Appendix, Pages 14a and 15a] was timely filed during the pendency of the proceeding.

Further distinguishing these cases is the fact that the trial court herein made a specific finding that the children were born "out of wedlock," and that based upon the testimony of the witnesses and presentation of DNA results, Appellee Lagrone was in fact the biological father of the children. [See Appellant's Appendix, Pages 4a to 8a] Such a determination was not made by the trial court in In re CAW (supra, Mich). Indeed, the Majority Opinion noted that at a pretrial conference in that case the mother and another man named Rivard asserted that Rivard was the father of all three children: *". . .The court, after questioning Rivard and Weber, accepted this as fact and the Petition was amended accordingly, including deleting any further reference to Heier. From this point on, the court and the parties in all proceedings referred to Rivard as the children's father."* In denying Heier standing to intervene, the majority specifically referred to the trial court's failure to conclude the children

were born out of wedlock: *"Moreover, no finding was ever made by the court that CAW was not the issue of the marriage . . .Thus, the requirements of the court rule to give Heier a putative father standing were not met."* In re Caw (supra, Mich). The implication from the plain language of the majority is that had the trial court made such a finding, standing would have been granted.

Appellee submits that the language and reasoning of the Majority Opinion issued in In re CAW (supra, Mich) clearly support the trial court's finding of putative father standing in the instant case, and of the court's authority to make a judicial determination of paternity.

WHEREFORE, Appellee respectfully requests that the Opinion and Order of the trial court judge herein be affirmed.

Respectively submitted,

Dated: October 31, 2003

J. DOUGLAS OTLEWSKI (P28959)
Attorney for Appellee/Respondent
118 Walnut
Rochester, MI 48307
(248) 651-6040